IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNION DEL PUEBLO ENTERO, ET AL,
PLAINTIFFS,
vs.
GREGORY W. ABBOTT, ET AL,
DEFENDANTS.
DOCKET NO. 5:21-CV-844-XR

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
NOVEMBER 14, 2022

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(San Antonio, Texas; November 14, 2022, at 1:00 p.m., in open court.)

THE COURT: Let's call LUPE versus Texas, 21 civil 844.

Appearances, please.

MISS PERALES: For the plaintiffs, Your Honor, the private plaintiffs, Nina Perales, representing the LUPE plaintiffs, and speaking -- there will be other plaintiffs' counsel participating remotely.

With me today is Robin Sanders, Julia Longoria.

THE COURT: Thank you.

And for the intervenors.

MR. GORE: Good afternoon, Your Honor, John Gore for the intervenors.

THE COURT: And anybody else who might want to address here, just identify yourself when it's time for you to do so.

So we're here on Docket Number 469, LUPE, et al and LULAC's opposed motion to compel production of documents and interrogatories. Has there been any advancement of this problem or where do we stand?

MISS PAIKOWSKY: Your Honor, I just wanted to briefly introduce myself, Dana Paikowsky on behalf of the United States and I have my colleague Richard Dellheim here as well.

THE COURT: Thank you.

So Miss Perales.

MISS PERALES: Your Honor, with respect to the Court's question, the status of the situation is reflected in the most recent briefs that have been filed.

THE COURT: Thank you.

So with that then, let me ask the question this way. Has there been any document produced by the intervenors?

MISS PERALES: No, Your Honor. The intervenors have not produced a single document, nor have they produced a privilege log, nor were they willing to accept any Rule 45 deposition subpoenas, with the exception of one, a Miss Fountain.

THE COURT: And while I'm asking the questions then, have they answered any interrogatory?

MISS PERALES: Your Honor, the defendant intervenors did provide a document purporting to respond to the interrogatories but much of what was in that document was relying on information identified by parties in the case, including State defendants. And with respect to identifying documents, of course, said that documents would be identified later.

THE COURT: And with regard to the requests for production, so how did you propound them? Did you propound them under Rule 34 or 45 to the intervenors?

MISS PERALES: Under 34.

THE COURT: Under 34?

MISS PERALES: Yes, as parties in the case.

THE COURT: Yeah. So you threw me for a loop when you mentioned 45 there.

MISS PERALES: Oh. Plaintiffs have also sought to depose five individuals as Rule 45 deposition subpoenas and those were individuals who volunteer essentially with defendant intervenors, like election integrity chair for the county republican party.

THE COURT: Thank you. So let's then turn to the discovery requests first. We can talk about the depositions later.

From the intervenors, who drafted your responses and objections?

MR. GORE: Your Honor, John Gore. Counsel drafted those responses and objections.

THE COURT: The name of counsel who drafted them.

MR. GORE: Oh, I see. Yeah, I did.

THE COURT: You personally drafted the responses and objections?

MR. GORE: With input from clients and other counsel on the team, yes.

THE COURT: And so have you read Federal Rule of Civil Procedure 34?

MR. GORE: Yes.

THE COURT: And so Federal Rule of Civil Procedure 34, I want to talk about objections. "An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest."

Did you allow inspection or production of any other documents?

MR. GORE: We did not allow inspection of documents as we were still collecting the documents at the time we propounded our objections and responses.

THE COURT: To this day have you permitted inspection or produced any documents?

MR. GORE: We have not produced any documents to date. We have engaged in multiple meet and confers.

THE COURT: So you're in violation of Rule 34.

MR. GORE: No, I don't believe that we are, Your Honor.

THE COURT: So how are you not in violation of 34?

MR. GORE: We have engaged in multiple good faith efforts to meet and confer with plaintiffs and their --

THE COURT: You haven't produced a privilege log and you haven't produced any -- I mean, are there no documents that are not subject to any privilege?

MR. GORE: We have been working to get -- collect those documents.

THE COURT: That's not answering my question. Are there any documents that you have in your possession, custody, or control that are not subject to any privilege?

MR. GORE: I don't know that. I don't believe that there are.

THE COURT: How can you not know that? How many months has it been?

MR. GORE: We are -- as I said, we've been collecting the documents. Our clients are political parties that engage in First Amendment protected activities, including political activities around the general election.

We believe there may be some documents -- here's, I think, where the rub of the issue is, Your Honor. They have asked, for example, for documents that were shared with the Texas Legislature by the intervenor defendants.

THE COURT: How is that subject to any privilege?

MR. GORE: We don't believe that it would be, but we also don't understand why they would need to get that from us rather than from State defendants --

THE COURT: Because State defendants are asserting privilege, which is the subject right now of an appeal at the Fifth Circuit.

MR. GORE: And anything that we propounded would already be part of the public record.

THE COURT: No, sir. No. What they are arguing up

there is that if a document happens to pass through a legislator's eyes, or if a legislator happens to whiff a document, then all of a sudden it miraculously becomes legislative privilege.

You-all are not members of the legislature, nor are you staff members of the legislature who consult with the legislators. And so you are third parties who gave up documents and sent them to various legislators and so you do not fall under that privilege. And you just admitted you don't fall under that privilege.

MR. GORE: I think the fact that we're not legislators underscores the difficulty and challenges that we've had with these particular discovery requests.

THE COURT: Have you read Federal Rules of Civil Procedure 26(g)?

MR. GORE: Yes.

THE COURT: And it says, "If certification violation" -- so by you, you admitted, Mr. Gore, that you signed and drafted these responses to discovery requests and the objections, "If you violated the Rule without substantial justification, the Court, on motion, or on its own, must" -- that's a must -- "impose appropriate sanctions on the signer."

So why shouldn't you be sanctioned individually?

MR. GORE: I mean, we have, in good faith --

THE COURT: You keep saying that. How many months

have gone by since your requests for production were due?

MR. GORE: It has been a couple of months, Your Honor. We recognize that. We've been trying to work out a schedule with the plaintiffs. They also asked for an extension from us, which we granted, with respect to the discovery requests that we propounded.

We were hoping to work collaboratively with them to understand their request. For example, Your Honor, they have asked for a bunch of things that underscore that aren't relevant to this case. For example, we're not members of the legislature. We didn't enact SB 1, and we don't enforce it.

They've asked us a bunch of questions about --

THE COURT: But that doesn't make it nonrelevant.

MR. GORE: Their theory of the case, and in their briefing, their theory is that that somehow reflects the legislative intent of the Texas Legislature.

THE COURT: No. What they are trying to determine, I'm assuming, is what was before the legislature that might have possibly informed their intent. And so you-all gave these individuals -- I'm assuming you didn't give it to every member of the legislature, but you gave them some things, and so they are entitled to look at what you gave them and what was before them to figure out whether or not it formed part of their intent.

MR. GORE: Even if we concede that point, Your Honor,

the broad swath and the lion's share of their discovery requests don't go to information that was before the Texas Legislature. It goes to information that's strictly internal to the intervenor defendants, their third-party political allies, and their own candidates.

THE COURT: Let's take this all a step. I guess if we have to do this, we'll do this the hard way.

Response to Request for Production Number 1. So they sought "All documents, including but not limited to communications, talking points, and memoranda sent to or exchanged with the Texas Legislature."

So that's not asking for stuff that was just internal to you. Request for Production Number 1 asked for stuff you sent or exchanged with the Texas Legislature. So how you responded to all of that was you said, "It's unduly burdensome, not proportional, overly broad, irrelevant."

So it's relevant. How is it unduly burdensome? Don't your clients know what they sent or exchanged with members of the Texas Legislature?

MR. GORE: We came up with a set of search terms that would cover the discovery requests.

THE COURT: You're not -- things go a whole lot easier when you answer the question I ask you.

MR. GORE: Yes, I believe the clients do know that.

THE COURT: Okay. So how is it unduly burdensome to

produce that then? That was your objection. You said it was unduly burdensome to produce that.

MR. GORE: I think we made a number of objections to these discovery requests.

THE COURT: And that's another problem. So, you know, the amendments, the rules of procedure were supposed to stop this gamesmanship. And so you had, before we even got to the request for productions themselves, nine and a half pages of objections. Those are all stricken.

The Federal Rules of Civil Procedure, as amended in 2016, do not allow these kind of boilerplate objections. Those days are gone. That's why I asked you whether you've read Rule 34 as it stands today.

So now we're going to stand by just the objections you raised in each individual request for production. So you've admitted to me now it's not unduly burdensome and you know what documents were sent. So why do you need this continued meet and confer with the other side to produce stuff?

MR. GORE: Well, for example, Your Honor, look at Request Number 2.

THE COURT: No, we're looking at 1.

MR. GORE: Okay. Well, I think --

THE COURT: You seem to want to -- you want to glance over 1 because 1 is very particular there about what you

should be producing and you're not producing it.

MR. GORE: As I said, we have told plaintiffs we will produce that by December 1st.

THE COURT: Why is it taking so long?

MR. GORE: Our clients are involved in the general election.

THE COURT: That's gone.

MR. GORE: It is.

THE COURT: And for the most part you guys lost, but go ahead.

MR. GORE: That's why we're collecting and reviewing the documents. We're actively reviewing the documents now. We've collected them. We're reviewing them. We're trying to identify specific documents that they fall into these categories.

THE COURT: Okay. So let's stop here. You just say your clients were heavily involved in the elections. Was the lawyer team heavily involved in the elections too that you couldn't be doing this work on the side?

MR. GORE: Yes.

THE COURT: Really?

MR. GORE: Yes.

THE COURT: So --

MR. GORE: And the plaintiffs haven't claimed any prejudice. Trial is still eight months away.

THE COURT: Well, when are they going to get these documents? Seven months from now?

MR. GORE: They will get them by December 1st. We will produce all the documents that fall into the categories of external communications with the Texas Legislature.

THE COURT: Okay. So you are throwing in caveats here. "External."

MR. GORE: Well, communications.

THE COURT: They are asking for what was sent to or exchanged with the Texas Legislature. That's your obligation to produce.

MR. GORE: I understand that and I'm simply drawing a distinction between internal documents that were not shared with the legislature and those documents that were.

THE COURT: Number 1 didn't ask for that.

MR. GORE: Excellent.

THE COURT: Okay. So then I'm hearing from you that you're going to produce all documents responsive to Request for Production Number 1 without objection and without any assertion of privileges by December 1. Is that what I'm hearing?

MR. GORE: Yes, Your Honor.

THE COURT: Moving on to 2. What's your objections to 2?

MR. GORE: Our objection to 2 is multifold. One,

that these categories -- this is not tied to SB 1. This says election administration. It says voting, election integrity, conduct of elections from January 1, 2020 to the present.

It's potentially a very broad swath of documents that aren't tethered to SB 1 and don't have anything to do with the legislature's decision to enact SB 1. We think that Request Number 1, if that's proper, there's no need for Request Number 2 because those documents don't relate to SB 1 and the legislature's decision to enact SB 1.

THE COURT: Now we've got a good response there.

So Miss Perales, what's your response to that?

MISS PERALES: Your Honor, our response is that if it's overbroad, what --

THE COURT: Well, what is the relevance of your request, I guess is what we need to establish first because you're only entitled to stuff that's both relevant and then proportional. So what's the relevance?

MISS PERALES: Well, looking at the term "election integrity," that is the articulated justification both by defendant intervenors and defendants for SB 1 and so we requested their communications, talking points, and memoranda that they provided to the decision-makers on election integrity. Election administration, voting, and the conduct of elections have to do with those things that SB 1 touches upon, because SB 1 is a very broad bill.

THE COURT: So but look at it from their perspective, how are they supposed to find this -- this is a large swath. You are talking about stuff related to election administration, voting, election integrity, and the conduct of elections.

I mean, so and you're not even caveating it to -- well, you are. There's a caveat here to "sent to or exchanged with the Texas Legislature." So what you're envisioning, I guess, first, that we're going to filter here from your set of data to just material that was exchanged with various members of the legislature from January 1 to 2020 to the present.

So we've got two filters here. One, stuff that was sent to or exchanged with legislators. And then, two, we have date parameters. But I'm also troubled here with we've got broad categories here. So how are they supposed to conduct that kind of search?

MISS PERALES: Well, Your Honor, we were waiting until October 20th for defendant intervenors to propose search terms for their document search.

On October 20th, defendant intervenor said that they had come up with search terms by themselves, not in consultation with us, had run them only on Harris County, and had come up with 24,000 documents.

We would have wanted all of this, first of all, to happen in August, but putting aside the timing issue, we would

have wanted a hit list to see the number of documents that were associated with each of these terms and the opportunity to negotiate with defendant intervenors about modifying the search terms that defendant intervenors had come up with.

They only ran their search terms for Harris County, have not even run those search terms for any other defendant intervenor, and have not provided us an opportunity to narrow the search terms.

THE COURT: So, you know, the rules anticipate that the parties will try to negotiate amongst themselves without court intervention on this, but this is where -- I speak on this topic nationwide and I'm going to go to Georgetown here in a couple of days on this very topic.

So I believe in communication between counsel, however, the rules are structured such that requesting party requests, then producing party produces. And until such time as there's a showing that the production has been deficient, you know, it's noble for counsel to try to negotiate between themselves as to search terms and key terms but I find nothing in the rules that mandate that requesting parties get to have a seat at the table about how a producing party engages in their production.

So that's basically what you are asking for. You are asking to be a part of the search terms. Now, so --

MISS PERALES: Well, Your Honor, production or a

privilege log.

THE COURT: Yeah. So here's the other problem with this is that they have produced nothing and I'm at a loss to understand what may be privileged. I don't believe that this is subject to any kind of legislative privilege. I'm not sure I understand what this First Amendment is about. So of course they have a First Amendment right as an entity to speak.

But you-all insist on interjecting yourself into this lawsuit. You guys weren't sued. You intervened. I denied you intervention. You took that up on appeal to the Fifth Circuit and the Fifth Circuit mandated that you be allowed to intervene. In fulfillment with that mandate, I allowed you to intervene.

And so to the extent that you're trying to argue now that you get to intervene and assert now some First Amendment argument that you don't have to produce anything, that's very perplexing to me. I don't understand that at all.

And this failure to produce any kind of privilege log, I don't understand that either, because the rules require you to do so.

So we're still left with an overly broad request for Production Number 2. You-all need to meet and confer on Number 2, figure out what key terms you believe would be conducive to getting what you think you need, but requesting party doesn't get to dictate how a producing party actually

does their production.

The caveat with that, though, is if you-all engage in a deficient production and a requesting party gave you key terms to search and you failed to do so, and then you do your deficient production and the deficient production is proved to be deficient, you again have created for yourself a new 26(g) rule violation for which I can entertain sanctions for.

So that's the obstacle you face by not meeting and conferring with the other side in a good faith effort to try to resolve this dispute.

MR. GORE: Your Honor, I believe I understand Your Honor's ruling on that point. I did want to address a couple of points that Your Honor raised, if I might.

First, one of our objections that these requests are overbroad is that they are way outside of the scope of the amended scheduling order that was entered in this case.

THE COURT: Well, so now that's a problem too, because the amended scheduling order in this case is after the Fifth Circuit's mandate and after I allowed you-all to come in, so --

MR. GORE: And that's our point. So the amended scheduling order limited discovery during this period to the primary election in 2022 and limited discovery against intervenors to witnesses we disclosed. We didn't disclose any witnesses, and yet they have come in with these very broad

discovery requests and requests for production.

THE COURT: Say that first part again for me.

MR. GORE: An amended scheduling order was limited to discovery during the primary election period. And it was -- the only discovery that was authorized with respect to intervenors was discovery against witnesses disclosed or newly disclosed by intervenors. We haven't disclosed any witnesses.

So they have come now with these very broad discovery requests that aren't tethered to witnesses we disclosed. We had understood Your Honor's order as a very narrow scheduling order allowing only very narrow discovery for the remainder of that primary election period.

There's a second period that's now started with respect to the 2022 general election. And the plaintiffs asked for that limitation. That was in the joint notice that was entered by the parties on June 7th. I can read, Your Honor, from that joint notice what the plaintiffs actually said.

THE COURT: One second. Let me pull that one up in front of me. Do you know what the docket number is on that one?

MR. GORE: Yes. It's Document 436.

Recall, Your Honor, after the Fifth Circuit's opinion in this case the case was remanded. We moved to intervene, which Your Honor granted, and Your Honor also vacated the then

existing scheduling order and ordered the parties to confer and propose a new scheduling order. And this joint notice issued on June 7th, filed with the court on June 7th, was that joint proposal to the Court.

And if you look at page 2, scroll down to the second full paragraph, it starts "plaintiffs' proposal." And this was plaintiffs' proposal with what should happen in the primary discovery period, which was the period ongoing at the time our intervention was granted, which the parties asked the Court to extend.

And if you look at the second sentence, it starts, "intervenors may conduct non-duplicative discovery" -- that would be us conducting discovery since we're new parties to the case. "Plaintiffs may take discovery of witnesses disclosed by intervenors."

And then there's some other discovery they wanted to take. They wanted to depose Miss Adkins, Miss Kristi Hart. And then a few lines down it says, "any witnesses newly disclosed by intervenors and any witness who may have testimony concerning documents produced pursuant to the motion to compel response to the legislative subpoena."

If you flip over to page 3, there's further language from the plaintiffs' proposal about how they envisioned the remainder of discovery going. So about two-thirds of the way down that page, the heading says, "Plaintiffs and County

Defendants' Proposal." This was the proposal with respect to the secondary discovery period. They want it to relate only to the November 2022 general election.

And then the next sentence says, "Plaintiffs and county defendants further propose that plaintiffs and defendants may commence or reopen no more than eight depositions per side, absent further leave of court."

Down to the bottom of page 3, carried over to page 4, they talk about a limitation on the number of depositions, "During the supplemental discovery period we will appropriately limit the burden on the parties around the general election season and reflect the more limited nature of discovery that needs to be completed." That's the discovery that the plaintiffs asked the Court for.

If Your Honor turns to Docket 437, that's the order from the Court which incorporates the limitations that the plaintiffs asked for. So on page 1, towards the bottom, there's a paragraph that starts "discovery."

"Discovery during the primary election discovery period may include discovery from witnesses both already and newly disclosed by intervenors." And then it lists the remainder of the discovery that the plaintiffs asked for, including the depositions of Miss Adkins and Miss Hart.

And at the bottom of the page it says that intervenors may conduct additional but limited non-duplicative

discovery.

If you turn to page 2, scroll down to the fourth full paragraph, starts discovery, "Discovery during the general election discovery period may include discovery on any and all matters relating to the November 2022 general election, as well as any and all documents produced in response to any and all successful motions to compel filed during the primary period."

Next paragraph, "The parties may commence or reopen no more than ten depositions per side absent further leave of the Court."

So what the Court authorized was what the plaintiffs asked for, which was very narrow discovery. We were candidly perplexed by their request for production propounded on us. We didn't disclose any witnesses. We haven't disclosed any witnesses at any period of this case.

THE COURT: You're confusing me now.

MR. GORE: Yeah.

THE COURT: We were talking about a request for production. How did we move to this topic about witnesses?

MR. GORE: Sure.

THE COURT: Production Number 2 didn't talk about witnesses.

MR. GORE: That's exactly our point. If you look at page 1 of your scheduling order it says, "Discovery during the

primary election period may include discovery from witnesses both already and newly disclosed by intervenors." That's the only discovery that the amended scheduling order authorized against intervenors.

Remember, the Court wanted to move the case forward, wanted to narrow the scope of the remaining discovery so that we could have a trial in this case next summer. And so the only discovery they asked for from intervenors and that they asked to be allowed to take from intervenors was discovery about witnesses that we might disclose.

Now, I assume that would have been document requests of those witnesses. That could have been requests for admissions of those witnesses. And obviously it would have been depositions of any such witnesses.

But we never disclosed any witnesses. So the only discovery they asked for was they wanted to know -- they wanted to have discovery against our witnesses. That's the only discovery the Court authorized.

And now they have come with these really broad requests for production and interrogatories that aren't aimed at witnesses disclosed by us because we haven't disclosed any witnesses. And that, we've raised that issue and we've asked them about it and we haven't gotten an answer as to how this fits within the scheduling order.

That's why we're a little perplexed by these

discovery requests, and one of the main reasons we say they were overly broad.

And let me just say, Your Honor, the reason I said before that we're happy to give these external communications to the plaintiffs, we think those are outside the scheduling order too but we understand that those may be documents that they are interested in, the Court may be interested in allowing them to have.

But beyond that, we've gone so far afield of any witnesses disclosed, non-existent witnesses disclosed by the intervenors, that's where our struggle with the threshold has been in trying to engage in a good faith meet and confer process.

THE COURT: What's your response to that?

MISS PERALES: Thank you, Your Honor.

I have to confess. It took a little while to understand defendant intervenors' reading of the amended scheduling order, but if I could start by saying that the operative document here is the amended scheduling order.

The amended scheduling order does not incorporate the joint notice that counsel has spent so much time focusing on. The only thing I will say about the joint notice, Docket 436, is that it nowhere says that plaintiffs seek to limit the discovery that they would take of intervenor defendants -- defendant intervenors.

The joint notice was filed with the court about three weeks after the defendant intervenors entered the case and there's nothing in here that says that we want to limit our discovery.

Counsel has presented a blend of both scope arguments and timing arguments and I think it's important to separate those when looking at the Court's amended scheduling order, Docket 437.

First of all, the Court provides the deadline for completion of discovery on matters related to the primary election as to plaintiffs', State defendants, and county defendants as August 12th. And then the Court provides the deadline for completion of discovery on matters related to the primary election as to intervenors is October 24th.

Plaintiffs propounded their requests for production and interrogatories in the first and second week of July. So as to paper discovery, Your Honor, all of that fits, even within defendant intervenors what we contend is a misreading of the Court's amended scheduling order of August 12th.

Nevertheless, defendant intervenors make scope objections to our discovery which was propounded even within their August 12th deadline, and they object to the scope of discovery claiming it really could only be as to witnesses that they disclosed because somehow when the Court says that "may include, primary election discovery may include discovery

from witnesses both already and newly disclosed by intervenors," that that is read as must be limited to discovery from witnesses both already and newly disclosed by intervenors. So we certainly don't read the scope limitations in this amended scheduling order that the defendant intervenors do.

And as to the timing, only to reassert, Your Honor, that we propounded the discovery on July 7th and July 13, the paper discovery, and then of course having not received any documents were then forced to try to notice depositions, you know, before the October 24th deadline which we do believe is a two-way discovery period.

When the Court says in its amended scheduling order, "The deadline for completion of discovery on matters related to the primary election as to intervenors is October 24th, 2022," we never understood that to be a one-way discovery where they were able to propound on us but somehow we were required to take all of our discovery before August 12th.

THE COURT: Let's step back though and let me understand the relevance, especially to Number 2 that's very broad. What do you think is relevant? What relevant materials do you think you're going to gather from the intervenors here regarding your case?

MISS PERALES: Well, Your Honor, we would like to know, at least with Number 2, which has to do with

communications with the Texas Legislature, materials that defendant intervenors were exchanging or sending to Texas legislators, for example, about election integrity, perhaps a communications urging legislators to adopt measures to ensure election integrity, because they were asserting that there was voter fraud and specific types of voter fraud and so it falls within that request on Number 2. We do believe it's relevant.

THE COURT: And so I'm still stuck with the phrases "election administration, voting integrity, or conduct," those are all very broad phrases. So I mean, do you have a sense of just who the key players are in this litigation now, because in Number 2 you have asked with the entirety of the Texas Legislature.

I mean, are there ten or 15 key custodians of data that you think are primarily in contact with the intervenor group? I mean, it's certainly not all several hundred of them, right?

MISS PERALES: It's more likely, Your Honor, to be the flip of that, which is that there are probably ten to 15 persons that defendant intervenors can identify who conducted most of the communications with the Texas Legislature. But it can't be said that only, for example, a committee chairman would be the only person who may have been in communication.

THE COURT: No, and I understand that. There's probably a committee chairman, and there's probably several

key staffers of that person, and there's perhaps a select few others. But what I'm hearing from you is you have not identified them?

MISS PERALES: No, Your Honor.

THE COURT: So how are we going to get through Number 2 then? You are hearing me say that your phrases are too vague. Are you going to withdraw Number 2 and try to rephrase, or how are you going to overcome this?

MISS PERALES: Well, Your Honor, to withdraw and rephrase would mean that there would be a change to the schedule because I think we're all in agreement October 24th has passed.

It is our contention that if there were responsive documents, for example, election integrity, that's a pretty easy to understand phrase and one that lies at the heart of defendant intervenors' defense of SB 1 in this case. They should have been able to produce those documents and then said, you know, we can't produce the others because it's too many or we don't know what that word means.

THE COURT: So Mr. Gore, have you done any kind of sampling of your database to figure out how many hits Request for Production Number 2 might generated?

MR. GORE: Not specific to Number 2. We have looked at election administration and election integrity. And especially voting, as you can imagine, that's an

extraordinarily broad term in our universe.

So we're happy to work with plaintiffs to talk a little bit about how to find other ways to narrow it, make it a little bit more specific to the legislature. But, again, if we just come back to the amended scheduling order where all of the discovery during this period was supposed to be about the primary election, this is way beyond that.

THE COURT: No, but I mean, how do you get past Miss Perales' and I think it's -- we're all textualists now -- right? -- so how did "may" all of a sudden become "will be only limited to?"

MR. GORE: Because it's clear from the order that the order, if you look at page 1, primary election discovery, the second paragraph, first and second paragraphs under that say, "The deadline for completion of discovery on matters related to the primary election," it says that in both paragraphs. That was the only discovery that was ongoing at the time of our intervention.

Discovery with respect to everything else had already been closed because the Court was going to be holding the trial over this past summer, right around the time we filed our motion to intervene.

THE COURT: But the second line deals with a deadline. It doesn't deal with scope. And then so we go one, two, three, four paragraphs, "Discovery during the primary

election discovery period may include discovery," so it didn't limit discovery to any kind of topics.

MR. GORE: No, that's exactly right, but I respectfully disagree on paragraphs one and two. Those are both deadlines and limitations of scope because they say "discovery related to the primary election."

Recall, there had been full discovery already in the case of expert witnesses, fact witnesses. The only discovery that was still ongoing was discovery about how SB 1 had been applied and administered in the 2022 primary election. That's what was going on at the time we intervened.

What the Court did was extend the period for that discovery. And then in paragraph 4 it authorized other discovery that was beyond the primary election consistent with the joint notice the parties had filed.

There had been disputes about deposing Miss Adkins and Miss Hart. There had been disputes about the LULAC plaintiff's motion to compel and documents that might be propounded in response to that, to an order on that motion.

So what the Court did was authorize a limited scope of additional discovery beyond the primary election. And that's -- if you read the joint notice, that's exactly what the parties asked for.

Parties asked for continuation of primary election discovery and a couple of categories of discovery beyond that,

given both that we as intervenors had just entered the case but also that there were lingering discovery disputes with respect to earlier periods. That's all this authorized during this discovery period.

And none of the RFPs are limited to witnesses disclosed by us or to the primary election. If you look beyond one and two and three and four, and we can go through the whole list, but none of them have anything to do -- they are certainly not limited, I should say, Your Honor, to the primary election or the witnesses we disclosed because there aren't any such witnesses. And that's, I think, the fundamental challenge here is to engage on that point.

The scheduling order is clear. And they haven't moved to amend the scheduling order. They haven't brought a motion under Rule 16. They haven't explained why good cause would exist to amend the scope of the scheduling order with respect to primary election and these other issues.

I think Your Honor is well aware that we didn't want to extend discovery when we intervened in the case.

THE COURT: I didn't know what you wanted to do.

MR. GORE: We wanted to be involved in the case and protect our legal interests here.

THE COURT: I thought the AG's office was doing a perfectly fine job without you, but go ahead.

MR. GORE: They were doing a fantastic job without

us, but there was limited discovery that lingered between the parties and an interest in taking more discovery related to the primary election. That was it.

And so we've been abiding by that or trying to abide by that and don't understand these requests to relate to be limited to the primary election or to be limited to witnesses we've disclosed. And we could walk through each of the requests and talk about why that is. I don't know that we need to belabor that and take Your Honor's time to do that, but that's where we've been fundamentally struggling.

THE COURT: Let me stop you here, Mr. Gore, though. To reread all nine pages of your general objections, you know what? You never raised that argument in all those nine pages, nor in response to any objections to the requests for production. In the objections you never raised that as an objection.

MR. GORE: We raised that it was overbroad and we further through the meet and confers and further correspondence --

THE COURT: Yeah, but, no, you never raised the scheduling order arguments that you're raising now.

MR. GORE: We certainly did in our further correspondence with plaintiffs about our overbreadth objection and about the burden objection.

THE COURT: Yeah. So we'll nip that one in the bud.

So the documents are relevant and they're not outside the scope of the amended scheduling order.

So now, plaintiffs' group, the verbiage is too broad. So "voting" especially. I mean, I don't know what to do about the word "voting," that's just that's crazily overly broad. So you work out amongst yourselves and I'll wait to see what kind of production is made.

What reasonable people should do is we ought to figure out who the 15 or 20 staffers or members of legislature were in contact with the intervenor groups from January 1, 2020, to the present, that exchanged communication talking about election integrity or administration. That's what reasonable people should do.

Hopefully, I have reasonable people in front of me.

MISS PERALES: Yes, Your Honor.

THE COURT: So we can spend the rest of the day going through all the others. I guess Number 3 and 4, and that's why Mr. Sweeney [verbatim] is here, so what makes communications different between the Office of the Governor, or the Office of the AG, the Lieutenant Governor, and the Secretary of State?

MR. SWEETEN: Your Honor, with respect to that issue, I think the position we've taken was on the depositions. I mean, that's our filing.

THE COURT: So you have no opposition to the

intervenor groups sending to the plaintiffs any communications they may have had with any of those four offices.

MR. SWEETEN: Well, I mean, Your Honor, we have not asserted such an objection, and those would be, you know, presumably in the possession of intervenors, if they exist. And so our interest was with respect to the scheduling order and the depositions, so...

THE COURT: Thank you. So hearing no opposition from the Attorney General's office about this, then why doesn't intervenors want to send out any information?

MR. GORE: So, again, I think our answer on Number 3 would be the same as our answer on Number 1. I think our answer on Number 4 and Number 5 would be the same as our answer on Number 2. We, again, just have the same overbreadth issue potentially. And I think I understand Your Honor to be encouraging us and instructing us to further engage on that, which we're happy to do.

THE COURT: So, unlike Number 2 though, I mean, here they're specific. They are asking about SB 1, SB 7, HB 3, HB 6. There's nothing here about this broad voting generally. Now, Number 4 does hit on what you are concerned about.

MR. GORE: Right. I may have been speaking in too much shorthand, Your Honor. I think Request Number 3 tracks Request Number 1.

THE COURT: Yeah.

MR. GORE: And Requests 4 and 5 track Request Number 2.

THE COURT: So I expect Number 3 is going to be fully complied with by December 1.

Number 4, again, I have problems with the general phrase "voting." That's unduly broad.

Okay. Number 5, Harris County. So you're under the impression that the intervenors were communicating with the elections administrator of Harris County or Dallas County?

MISS PERALES: Yes, Your Honor, because the intervenors include the Harris County Republican Party and the Dallas County Republican Party, so it is our expectation that there would have been communication between them.

THE COURT: But that's not what you're asking for. You are asking about not the Harris County party or the Dallas County Republican Party, you are asking about the elections administrator of Harris County.

MISS PERALES: Yes, Your Honor. Defendant intervenors' communications with local elections administrators in Harris and Dallas County.

THE COURT: And so I'm frankly kind of surprised. Do you guys have any communications that you said to those two administrators?

MR. GORE: I can't say for certain, but I don't think many, if any.

THE COURT: So then your objection which is -- I know I'm riding you guys hard, but when you raise an objection of unduly burdensome, it can't be unduly burdensome if you already know that there's not many.

MR. GORE: I think that reflected our knowledge at the time, Your Honor, but, yes, I understand Your Honor's point.

THE COURT: Number 6.

So Number 6, the problem, Miss Perales, is you don't have any date parameters on this. I guess you reference SB 1, SB 7, HB 3, and HB 6. I mean, every legislative session there's an SB 1 -- right? -- SB 7, HB 3, and HB 6. Which legislative session are you talking about?

MISS PERALES: I believe those are in the definitions provided with the discovery, Your Honor, but they are limited to those bills and their relevant sessions.

THE COURT: Yeah. So, you know, again, now I'll harp on you. Just like what the intervenors did, nine pages of general objections is improper. And then requesting parties coming up with their own listing of definitions is also improper. You have to list with specificity in your request for production what you're seeking, and so --

MISS PERALES: I don't believe there's been a misunderstanding as to those phrases, Your Honor, but we are more than happy to clarify that, you know, SB 1 belongs to its

relevant session, and so forth.

THE COURT: Now, the other problem I have is, okay, so let's assume that the intervenors were discussing with The Heritage Foundation and Texas Public Policy Foundation and all these other groups, how is that relevant to what was before and what was the intent of the Texas Legislature in enacting this legislation?

MISS PERALES: This is an appropriate moment, Your Honor, to point out that plaintiffs have not limited their claims in this case to intentional racial discrimination, although those claims are in the case and we do consider them important.

There is other evidence in this case, including the effect of the challenged provisions of SB 1. And it is certainly our interest to learn if there were any communications or other documents among defendant intervenors opining as to the likely impact of SB 1, particularly on groups of vulnerable voters.

THE COURT: I'm still stuck with, okay, so you picked certain parties, The Republican Party of Texas. Maybe I see some relevance there, but if the intervenors are having communications with The Heritage Foundation or The Texas Public Policy Foundation, I mean, why limit it to those groups? Why not ask whether any of those insurrection groups on January 6th were all part of this?

I mean, I don't understand where you're getting at with this list.

MISS PERALES: These groups are often associated with claims of voter fraud, using certain methods of voting, and so we certainly were being thoughtful about the list that we created and putting on there lists of groups that do talk about voter fraud with respect to, for example, mail voting, or what is called in SB 1 "vote harvesting," and other practices that we contend are impaired or limited under SB 1.

THE COURT: But where's -- one second. I'm trying to help you out, so, don't worry.

So I'm trying to figure out here, though, I mean, let's assume The Heritage Foundation is thinking about these kind of issues and they are in discussion with the intervenors. I still don't understand.

You're going to have to have a tie in then, right? Don't you have to bring in that somehow or another that members of the Texas Legislature or at least the leadership team were aware of The Heritage Foundation and their positions on all this?

MISS PERALES: Only with respect to the intent claim, Your Honor, but because we have other claims such as the effect, a document or an email going --

THE COURT: Oh, it just dawned on me what you're doing. Okay.

Yeah, so you want to respond to that?

MR. GORE: Yeah, I do, actually, Your Honor. Thank you.

So a couple of things. It's not relevant to any issue presented in the case, not even on effects because, again, these are communications that are internal and they don't necessarily reflect anything about the effects of SB 1.

So, for example, we've also raised a First Amendment objection here that I think is a very strong one and we've put declarations into the record about this. So let's just say, and I don't know if this is true or not --

THE COURT: So let me make sure I understand your First Amendment arguments. So, yes, your group has a First Amendment right to speech, but how is it being curtailed in this lawsuit by requiring you to produce documents that you've been sending out to all over the world?

MR. GORE: Let me cite Your Honor to the *Perry versus Schwarzenegger* case from the Ninth Circuit, which we've relied on in our briefing.

THE COURT: So wait a minute. I just want to make sure. There is a national Republican group relying on Ninth Circuit case law?

MR. GORE: We're all textualists now, as I think Your Honor said before.

THE COURT: Okay. I just want to make sure I caught

that. Okay.

MR. GORE: Certainly. And in that case it was proponents of Proposition 8 in California and intervening to defend that particular proposition.

The Court held that those intervenors were entitled to the full discovery protections of any party, including the First Amendment, and they showed in that case that any internal communications, or communications just with their political allies, weren't relevant to the questions presented in that case, and, in fact, were protected from disclosure.

The right to associate with other like-minded groups includes the right to communicate about common issues -- issues of common interest with respect to public policy, politics, election integrity, election administration, or SB 1.

So, for example, if there was some document from The Heritage Foundation -- and I don't know if there is or there isn't -- let's say there was a document from The Heritage Foundation where it was -- again, this is not stuff that was broadcast publicly or put on its website or sent out to the general public, but there was some communication back and forth between that group and my clients formulating a position with respect to SB 1, formulating a position with respect to election integrity measures or voting measures, that's all protected from compelled disclosure under the First Amendment

under the *Perry* case and a long line of other cases.

THE COURT: So I could see that argument being made that this was to a third party, but by you intervening in this lawsuit, why haven't you waived that argument?

MR. GORE: We haven't waived our First Amendment rights by intervening. That's what the *Perry* case holds. The *Perry* case holds that when an intervenor comes into the case, it has the same rights as any other party.

THE COURT: But you have your rights. No one is curtailing it. You-all get to talk to all these other groups. What's being done, pursuant to Rule 34 is, since you have now, you've made yourselves parties, what's being required is you have to disclose, and so I still don't understand the First Amendment abridgment.

MR. GORE: It's just like attorney-client privilege. We didn't waive our attorney-client privilege by intervening in the lawsuit. They can't now ask --

THE COURT: But the First Amendment is not a privilege. It's a right.

MR. GORE: No, but it's a privilege against compelled disclosure. It's a privilege against compelled disclosure of internal communications, strategy discussions on issues of public policy and public import. It's clear -- that's a clear holding in the *Perry* case and other cases that we've cited in our briefs. And so we have a -- the privilege is against

compelled disclosure of internal communications and internal documents with respect to public policy positions and issues of public import.

And we've even put affidavits into the record from each of the clients explaining how compelled disclosure of these documents and communications, such as they exist, would have a chilling effect on the intervenor defendants' ability to formulate positions and engage in the political process, as is their right under the First Amendment.

THE COURT: So assuming you are right, you get to keep everything out? Like let's just say that your client sent to The Heritage Foundation some already existing report in academia. Does that communication also now get subject into this umbrella of a First Amendment protection, or is it internal communications back and forth? How far does your argument go?

MR. GORE: We think it goes quite far. Now, to your hypothetical, I don't know if there is some academic study that was passed around these groups.

THE COURT: That's the problem with all of your broad objections. And I guess I have another problem with your -- I don't know -- I mean, by this time I'm amazed that you guys have not figured out what is there.

It would be a whole lot more productive to have a fruitful discussion if we actually sort of knew what was in

existence. I mean, hypothetically there may be nothing with regarding, you know, ten of these groups and we could be having an easier discussion saying "none."

MR. GORE: Right. And I appreciate where Your Honor is coming from on that, but I think in principal any of the communications that went back and forth certainly would be protected by the First Amendment.

I'll just note that with respect to our discovery request the plaintiffs have also asserted First Amendment privileges. And the LULAC plaintiffs have even said they are not going to identify or produce documents in response to a similar request, which would add communications and documents that may have exchanged with other third-party political allies.

So I don't think the position we are taking is unique. I think it's well supported by the case law, including the *Perry* case, and it's consistent with the position that at least some of the plaintiffs' groups have taken with respect to our discovery request.

So we think there's a serious First Amendment issue here, and we've also cited cases that say because it's so obvious on its face that these requests strike at First Amendment protected communications and we don't even have to produce a privilege log, and those cases we have cited to Your Honor as well.

If you look at the scope of these requests, 6 and particularly 7, which goes beyond SB 1, again, it's election administration, and voting, and everything under the sun. Again, we're getting into areas of public policy advocacy where the intervenor defendants have a strong First Amendment right, any privilege against compelled disclosure, whether it's under third-party discovery requests or first-party discovery requests, it's all the same. That First Amendment privilege persists as plaintiffs themselves have recognized.

MISS PERALES: Your Honor, if I may, four quick points.

First, as to Request for Production Number 6, these are not internal to defendant intervenors. The Heritage Foundation is a 501(c)(3) organization. I think it would be a great surprise to them to hear that they work for the National Republican Party.

THE COURT: Maybe, maybe not.

MISS PERALES: Nevertheless, these are completely separate.

THE COURT: I get that, but his point still remains, okay, even with separate third-party organizations he argues that they have a First Amendment right to communicate with each other.

MISS PERALES: And he points to *Perry versus Schwarzenegger*, and we do encourage the Court to read that

case because *Perry versus Schwarzenegger* says that the privilege is evaluated document by document and that there should be a privilege log.

We are at step one here with discovery, failure to produce any documents and no privilege log. The defendant intervenors want to take you to step three, which is somehow making rulings on privilege assertions that are not specific to any documents.

They have not run their own search terms against four of the five defendant intervenors. And their declarations, you know, it's the same declaration each time, but only Harris County includes the number of documents that were produced from the search term run. The others omit that sentence. And it's our understanding that they haven't even begun to run these searches, or if they have we haven't heard a single thing about them.

Finally, Your Honor, with respect to plaintiffs' discovery responses, LUPE plaintiffs gave the Bates number ranges of all of the documents that they produced to State defendants that were responsive to defendant intervenors' discovery requests because there was the overlap there. We held nothing back under the First Amendment, and --

THE COURT: So Mr. Gore says that you were raising claims that some other third-party groups affiliated with you-all you held back.

MISS PERALES: Well, to the extent that there is any plaintiff who has not yet produced the documents or has invoked the First Amendment privilege, they have not refused to produce a privilege log. The plaintiffs are united. There may have been different discovery responses from different plaintiffs, but the plaintiffs are united on two points. The privilege has to be asserted document by document and there has to be a privilege log.

And the fact that the Court is struggling at this point, asking, well, is there one document, or what sort of document might that be, is directly the result of the fact that we are at step one here and we should not be fast-forwarded to making rulings on, you know, privilege assertions for documents that haven't even been included in a privilege log.

MR. GORE: If I might, Your Honor, let me just cite to the LULAC plaintiff's responses to our request for production, which is the ones I referred to earlier. We have attached those as an exhibit to our reply brief that we filed on Friday.

Page 13, they reproduce Request for Production Number 6, which lists a number of groups, such as Priorities USA, moveon.org, Fair Fight, MOVE Texas, Project Vote, their objection is this request seeks communications and documents which would divulge any existing strategic partnerships and

operations and intrude upon LULAC's First Amendment's rights. Disclosure of such information would severely chill LULAC's exercise of its associational rights and those of its strategic partners. And then they say LULAC will not identify or produce documents in response to those requests.

THE COURT: It didn't produce a privilege log?

MR. GORE: To date it has not.

MISS PERALES: The discovery was served much later, Your Honor, and so, you know, it is --

THE COURT: Are you intending to produce a privilege log on that, or not?

MISS PERALES: I represent the LUPE plaintiffs in this case and not the LULAC plaintiffs, but I do believe LULAC plaintiffs are here in the hearing today and might be able to speak for themselves.

I will say they have not refused to produce a privilege log and that discovery schedule is much later -- is much later in time than the one that we are dealing with here today.

THE COURT: I'm going to think about 6 and 7.

Okay. We are on 8. So why isn't 8 also -- well, so here's the problem I have with 8. I mean, do you think the intervenors produced poll worker training materials, is that what you are trying to get at?

MISS PERALES: Yes, Your Honor. Election judges,

election clerks, and other poll workers, training materials, presentations created or provided, yes.

THE COURT: So, I mean, I thought the Secretary of State provided training materials. Are you trying to argue that the Secretary of State devised that office's training materials based upon what these intervenors gave?

MISS PERALES: No, not at all, Your Honor.

THE COURT: Well, then, how is this relevant?

MISS PERALES: Well, because the defendant intervenors, we believe, provide additional advice and training to poll workers and election judges, separate and apart from what the Secretary of State does to train.

THE COURT: So you are talking about to the Republican designees?

MISS PERALES: Yes, Your Honor.

THE COURT: Your response to that.

MR. GORE: Yeah. Your Honor, I will say that prior to SB 1 I believe there were such training materials. SB 1 created this requirement for the Secretary of State in the first instance. I don't know what pre-SB 1 practice has to do with the challenge to SB 1.

THE COURT: That's not what I'm hearing. What I'm hearing is -- well, maybe I'm wrong.

What I thought you were telling me is in light of SB 1 the intervenors created training material for Republican

party designees. Is that what you are asking for?

MISS PERALES: Well, before and after, Your Honor.

THE COURT: So he's saying before there was no requirement and that they didn't do it.

MISS PERALES: No. I believe they are saying they don't do it now but they used to.

MR. GORE: We did provide training before SB 1, but what does that have to do with SB 1?

THE COURT: Well, that's a good point too. So let's say they did provide training materials before SB 1. What's the relevance of that?

MISS PERALES: The relevance of that, Your Honor, we believe has to do with their position with respect to ensuring election integrity and what types of practices or changes, you know, they think are necessary.

THE COURT: Yeah. No, you're asking actually for the training materials created for poll workers, and so the representation being made to me is after the enactment of SB 1 the intervenors never did anything else.

MISS PERALES: We don't have that in the discovery response, Your Honor.

MR. GORE: I don't know what did or did not particularly happen with respect to the general election. I just want to be clear on that point.

But I'm looking at this discovery request. It goes

back to January 1st of 2018. It's saying, with Request 9, if we look at those together, that's three and a half years before SB 1 was enacted.

THE COURT: So your relevancy objection is sustained there. Anything after the enactment of SB 1 that your clients created needs to be produced.

MR. GORE: Your Honor, I'll just note for the record we have raised also a First Amendment objection with respect to these, since they go to our political activities in concert with our own volunteers and our own party officials.

Internal communications we may or may not have with poll watchers are part and parcel of election day operations, part and parcel of exercising our rights to participate in elections.

THE COURT: Let's just take a wild hypothetical, completely unfounded. You-all created training material that told your poll workers, "Everybody come armed to the hilt when you're doing your poll watching," you don't think that's relevant to being produced?

MR. GORE: I appreciate that that's a hypothetical.

THE COURT: That's a wild hypothetical.

MR. GORE: Wild hypothetical. Thank you for that caveat.

I don't think it's relevant to the operation of SB 1, because the question here is how does SB 1 operate in

practice, and our poll watchers who are complying with SB 1 or otherwise exercising rights under SB 1 somehow violating the laws of SB 1 create a violation of the law with respect to those poll watchers.

So I'm not quite sure. I don't think there's a claim related to "being armed at the hilt," at a polling place, but I do believe there are other claims with respect to poll watcher activities. Those are activities that poll watchers engaged in as poll watchers in a polling place.

THE COURT: Let me make sure I understand your First Amendment argument on this then. I mean, you-all have no control over who the poll watcher is, right? And so there may not even be an association between your clients and the poll watcher. They may be completely unknown people to you.

MR. GORE: Well, the poll watchers are appointed by the parties or the candidates.

THE COURT: But you're not the Republican Party of Texas.

MR. GORE: But the county parties participate in that as well, so...

THE COURT: But you're not the Harris County Republican Party either.

MR. GORE: Yeah, we are. That's one -- one of the intervenors is the Harris County Republican Party and another is the Dallas County Republican Party. And they participate.

And they in the past -- those are the entities in the past that have done poll watcher training. I agree with you on the national parties. National parties aren't involved in this, but the county parties have in the past, in the pre-SB 1 world.

When I said there was some training, it was done at the county level not by the national party entities, and so those county parties do designate poll watchers consistent with SB 1 in the Texas Election Code, so those are actual poll -- poll watchers are representatives of parties and campaigns.

I think what Your Honor may be asking about is poll workers and election judges. And I'm not aware that there's any -- ever been any training with respect --

THE COURT: Yeah. No, I was talking about poll watchers. Yeah. I'm going to take under advisement 6, 7, and 9.

Moving to 10. So what are you trying to get at here, Miss Perales?

MISS PERALES: Sorry, Your Honor. I was catching up on my notes.

Instances of poll watchers or poll workers discriminating against or harassing voters is directly relevant to the rules that were in play before SB 1 and the SB 1's loosening of controls on poll watchers, for example.

THE COURT: Well, I mean, this thing is so vague though. I don't even understand what you're looking for. Are you talking about like one instance a discrimination of harassment was reported, that you're asking for any documents that they received about a report? Or are you trying to get at documents where they are inciting people to discriminate?

I'm not sure I understand the question at all.

MISS PERALES: Any and all, Your Honor.

THE COURT: Any and all is no longer allowed either.

MISS PERALES: Point well-taken, Your Honor.

We are looking for documents that touch on questions of either poll worker or poll watcher harassment or discrimination against voters, whether that is a report received by the party entities that are defendant intervenors or discussions of those things internally.

THE COURT: Isn't that stuff you should be getting from the Texas Secretary of State's office?

MISS PERALES: Sometimes a poll worker harassment or watcher harassment is reported to the Secretary of State, but not all the time. Sometimes it can be reported to a candidate's campaign office. Sometimes to MALDEF. Sometimes to a county party.

But there could also include an internal document saying, "When we tell people to stand very close to voters, we get complaints that our poll watchers are harassing those

voters." It could be an, you know, an internal discussion document as well showing an awareness of, you know, some of these things that poll watchers can do sometimes that are felt as harassing.

THE COURT: Do you-all receive any of these kind of reports? I mean, I guess the Harris County party might?

MR. GORE: We don't receive official reports, no. Those would go through official channels. Whether some voter may have called and said I'm having this issue, I can't speak to that. I guess it's possible. I would note that this -- again, the date range goes back to January 1 of 2018.

THE COURT: Well, that's changed to the SB 1 effective date.

MR. GORE: Okay. Thank you.

THE COURT: Now, with that, does that cure your objections, or not?

MR. GORE: I think no for two reasons.

One is that SB 1 -- again, I haven't heard how this is relevant to SB 1. SB 1 does require poll watchers to swear an oath that they won't harass voters at the polls and they won't interfere with the voting process.

So if there's an allegation in the case that poll watchers have been doing that, in the post-SB 1 world, I guess that gets to defects in SB 1 and part of their challenge, but I don't understand the pre-SB 1 challenge on that at all, nor

do I understand why any one off call to us would be at all relevant to the operation of SB 1 as opposed to some official report somewhere else.

The second thing I'll note is, again, to the extent that poll watchers are agents of the party, if we're having communications with poll watchers about any topic related to election administration implicates our First Amendment rights and privileges and our opportunity to engage in that political activity which is guaranteed both by statute in Texas and by the First Amendment.

THE COURT: I'm going to take 10 under advisement.

11. So now, 11 clearly implicates any of those First Amendment arguments that Mr. Gore is raising.

How do you get around that?

MISS PERALES: Your Honor, we believe the First Amendment privilege has to be evaluated document by document and after the production of a privilege log. We don't not believe in the First Amendment, but we do believe fervently that it has to be evaluated appropriately and as contemplated by the rules of discovery.

MR. GORE: I'd just like to note on the privilege log question, Your Honor, we have cited several cases, including cases after *Perry*, that hold that a privilege log isn't required where it's obvious on the face that the request would implicate the First Amendment privilege and that compelled

disclosure would violate the First Amendment.

I'll cite the Court to the *Apple* case that we cited to in our reply brief that we filed on Friday.

I'll also note that with respect to certain of these individuals, this would really apply to poll watchers and other volunteers. Disclosure of their names on a privilege log also implicates their First Amendment interests.

And there's a case we have cited in our reply brief, *The American Civil Rights Union* case that talks about how compelled disclosure of identities of volunteers on behalf of a political operation could violate the First Amendment, particularly when what we are talking about is a hot button issue like election integrity and election administration --

THE COURT: Well, that could be overcome by redaction, right?

MR. GORE: Certainly with respect to the names, that's true, but I just wanted to make the point that there's another level to the First Amendment objection with respect to disclosure of those identities, in addition to the broader First Amendment points that we've raised.

I think as Your Honor has pointed out, both 11 and 12 are communications between the parties and their candidates, strikes right at the heart of the First Amendment.

THE COURT: Yeah. This goes all the way down to 20. I'm going to take 6, 7, 9, 10 through 20 under advisement.

And I'll let you know whether I sustain the First Amendment claim in its entirety or require a privilege log, and so we'll get back to you on that.

So then while Mr. Sweeney is here and the U.S. Government is here, what else do we need to take up? Do we need to take up depositions, or what else do we need to take up?

MR. SWEETEN: Your Honor, so we did file a short motion addressing the issue of depositions. Mr. Thompson -- and I answer to Sweeney or Sweeten, so --

THE COURT: Oh, I'm sorry. I apologize.

MR. SWEETEN: No worries, Your Honor. But Mr. Thompson is here to address that issue, if you will allow.

THE COURT: Go ahead, Mr. Thompson.

MR. THOMPSON: Your Honor, I am happy to go first, if Your Honor prefers it that way --

THE COURT: It doesn't matter to me.

MR. THOMPSON: -- I think it's a smaller piece of their dispute about depositions and I'm happy to come at the end.

THE COURT: So they want them and you don't, so go ahead.

MR. THOMPSON: Okay. Thank you, Your Honor.

And for the court reporter, my name is Will Thompson from the Office of the Attorney General. I represent the

State defendants.

The gist of this is the deadline issue, Your Honor, that's addressed in the amended scheduling order. There's a deadline for primary election related discovery as to the pre-existing parties that was in August. There is a deadline for primary related discovery.

THE COURT: So, you know, we always want to keep visiting the past. Let's just move forward. So apart from deadline issues, what's the real objection to presenting people for deposition?

MR. THOMPSON: So they are not even our deponents. Your Honor, our only point is, if they are conducting discovery depositions at this point in time, we are in the general election discovery period. Your Honor imposed a ten deposition limit, and those depositions should count against their limit.

The only thing we're trying to avoid here is kind of a mismatch of, we all agreed to ten, and now they are going to get 18 instead.

THE COURT: So, you know, I'm not metaphysically present behind the scenes, so I have no idea how many depositions have already been taken place. So what has taken place?

MR. THOMPSON: As to the primary election discovery, that's all over and done with I think. I don't know the exact

numbers but many dozens of depositions were taken. What I'm talking about is the general election period. I believe the answer is zero as to both sides.

THE COURT: So you confused me by 18. Where did we go to 18?

MR. THOMPSON: When they noticed these depositions, there's a dispute between the movants and respondents as to whether these depositions count on the ten per side limit. We took the position it does count. They took the position it doesn't. There's been discussion in the papers about whether Your Honor will clarify that in this hearing.

To the extent Your Honor decides to addresses it, we believe that the deposition conducted at this time should count toward the limit. There's nothing in the scheduling order that provides an exception to that, that I'm aware of.

THE COURT: Miss Perales.

MISS PERALES: Your Honor, we have a position on this and so does the United States. My understanding of the situation is that the Court's amended scheduling order allows for a period of discovery after the general election, including ten depositions per side. And that's the general election period of discovery.

Plaintiffs have sought to depose defendant intervenors' witnesses, and we sought to do that within this period of time in which we were taking discovery of defendant

intervenors.

We have noticed 30(b)(6) depositions of the defendant intervenors themselves, as well as five Rule 45 associated persons depositions. Those depositions should not count against the ten depositions per side provided by the Court.

THE COURT: So are you saying it's ten, ten, ten, and ten, is that what you are saying?

MISS PERALES: Ten per side.

THE COURT: So my point is how are you counting sides? Is the U.S. one side? Is the intervenors another side? Are the plaintiffs' groups another side and the State defendants another side?

MISS PERALES: No, Your Honor. We are one side. And they are another side.

THE COURT: Okay. So then if you're taking six depositions, then are you limiting yourself to four others?

MISS PERALES: No. We do not want to limit ourselves to four because the amended schedule says as to the general election discovery we should have ten per side. We don't want to disturb that, but our depositions of defendant intervenors, which were supposed to start in the early fall after we got the documents --

THE COURT: You are saying these were primary depositions --

MISS PERALES: Yes, Your Honor.

THE COURT: -- and should not be counted against on the general count?

MISS PERALES: Yes, Your Honor. Thank you for clarifying.

THE COURT: Okay. Now I get it.

So what's wrong with that, Mr. Thompson?

MR. THOMPSON: Thank you, Your Honor.

I think there are two problems with that. The first is these deposition requests came well after the deadline for any depositions related to the primary elections. And the second point is, at least as I understand it, these depositions would not be limited to the primary election, just kind of the substantive limitation for the -- for those earlier sets of depositions.

As I understand it, there are definition sections within the notices that include general election voting, for example. And so that's the two parts, untimeliness, and it's not actually limited to primary discovery.

THE COURT: So Miss Perales, he's complaining that there's going to be seepage.

MISS PERALES: No, Your Honor. We offered to limit the depositions of defendant intervenors to primary election questions so that they wouldn't count against the ten per side in the general election discovery phase. And I can find a document --

THE COURT: Let me make sure I nail you down on this.

What I heard Mr. Thompson complaining about is you are going to ask about primary stuff but there's going to be seepage going into general, so basically you get a double depo.

MISS PERALES: We -- I don't believe that's our position, Your Honor.

THE COURT: So you're telling me you're not going to ask of those six people general election questions?

(Off the record discussion)

MISS PERALES: I have to go back to the letter, Your Honor, just to make absolutely sure, but my understanding is that we offered to limit the depositions to primary election only. And then, of course, if we could -- if we wanted to use one of our ten per side on one of those people, I suppose then we could do that because the ten per side would remain intact.

MR. GORE: Thank you, Your Honor, a few points, and we agree with the State defendants on the points they have raised so I won't belabor those. But, again, we are getting far afield of the amended scheduling order.

THE COURT: But the timing, going back to the timing, the timing was all a result of the Fifth Circuit mandate.

MR. GORE: Well, let me address the timing portion first then. I was going to address it second portion but I'll do this first.

Page one of the scheduling order says, "The deadline for completion of discovery on matters related to the primary election as to plaintiffs is August 12th, 2022."

They didn't indicate an interest in deposing anyone from the intervenor defendants until October 5th. So on October 5th we got an email saying that they wanted to depose some individuals that they had identified through Google searches. They are not witnesses we disclosed, which is my other point on the amended scheduling order.

Again, if you look at that paragraph in the amended scheduling order on page 1, it says, "During the primary election period discovery may include discovery from witnesses already and newly disclosed by intervenors." These are not people we disclosed. We haven't disclosed any witnesses.

So these are individuals who they have located and asked to be able to depose. That didn't happen until October 5th. The depositions have been noticed for January.

In addition to those individuals, they've also noticed some 30(b)(6) depositions. It's a total of eight depositions, nearly double the ten deposition limit that's in the current scheduling order.

It's also double the limit they asked for in the joint notice. They only wanted eight more depositions as of the date of the joint notice when we were already parties. So now what they are seeking is 18 total depositions when they

asked for eight and the Court granted them 10.

I'll also just note that it is true that at one point as we were trying to negotiate back and forth the plaintiffs offered to limit these depositions to matters related to the primary election. They then rescinded that offer and took a different position in subsequent correspondence and in their briefing before the Court.

Take a look at the 30(b)(6) notices, which, again, we have appended to our briefing. The 30(b)(6) notices are just the RFPs copied and pasted. So all the issues we've talked about earlier today with respect to First Amendment privilege, with respect to overbreadth, with respect to scope, and relevance of their RFPs, also pertain to the 30(b)(6) notices that they've issued.

So this goes well beyond anything limited to the primary election. It has nothing to do with the primary election, for all the reasons I have said before, just like their RFPs aren't limited to the primary election.

So we've gone beyond anything that was in the amended scheduling order, beyond the primary election, and these were noticed well after the deadline and have carried forward now into January.

And again, we are unclear as to what any of this has to do with SB 1. What our clients may have done before SB 1, with respect to internal communications and internal political

strategy, not only is protected by the First Amendment but has no bearing on SB 1's operation.

So for all those reasons, including what's in the scheduling order and what the State defendants have laid out today, we agree that these depositions should not be allowed to go forward and that any depositions they want to take count against the ten deposition limit.

MISS PERALES: Your Honor, before the United States gives their position I wanted to refer the Court to ECF 469-12 at pages 2 through 4 where plaintiffs offer to limit depositions of the defendant intervenors to matters related to the primary election.

I also, with permission to approach either the bench or the courtroom deputy, have prepared a demonstrative exhibit for the Court to spare some of the work that may go into the Court's ultimate ruling.

MISS PAIKOWSKY: Your Honor, Dana Paikowsky for the United States.

To be clear, the United States has not served any discovery on defendant intervenors, nor have defendant intervenors served any discovery on the United States. So we participate in today's hearing for the narrow purpose of ensuring that adjudicating or the resolution of this discovery dispute will not prejudice the United States' interests here.

As we explained in our filing to the Court, we

believe that it would be appropriate for the Court to clarify, to find good cause exists to clarify that the amended scheduling order -- excuse me -- that any depositions that the private plaintiffs may take of the defendant intervenors that did not concern the November general election will not count against the ten depositions that have been provided cumulatively for plaintiffs' side.

THE COURT: So I was right. It is ten here, ten here, ten here, and ten there?

MISS PAIKOWSKY: No, Your Honor. It's ten total for the United States and private plaintiffs related to the November general election.

And so, as we understand it, the private plaintiffs are looking to take depositions of the defendant intervenors for matters that relate purely to pre-general election matters, so primary election matters.

And so we believe that good cause exists to enter that any of those depositions that don't relate to the general election do not count against the ten deposition amount that was provided to the plaintiffs' side parties to discuss the November general election, in part because we believe that those depositions are necessary to present the Court with a full record of what transpired during the November general election.

THE COURT: Thank you.

Do you have any input onto this argument about the First Amendment and how the Court should navigate around some of this that will likely come up in depositions?

MISS PAIKOWSKY: Not at this time, Your Honor.

THE COURT: That was helpful. Thank you.

Mr. Gore.

MR. GORE: Your Honor, thank you.

I just wanted to point out one thing. Miss Perales sort of cited to the portion of the record where plaintiffs had offered to limit that. As I mentioned, that was withdrawn. I cite Your Honor to Document 471-6, pages 1 to 2, to which we responded at 471-7. Those were attachments as exhibits to our first brief here.

So there was some back and forth on this. The plaintiffs' position changed. And if you read the briefing, there's nothing in the briefing that those depositions would be so limited.

THE COURT: I'll enter an order about how the depositions should go forth. I'm going to take all of this under advisement.

What else do we need to talk about while we are here, Mr. Gore?

MR. GORE: I don't believe anything from us, Your Honor.

MR. SWEETEN: Nothing, Your Honor, from the State

defendants.

THE COURT: Anything else from the plaintiffs?

MISS PERALES: Nothing from the plaintiffs, Your Honor, only that my -- the attorneys with me here have urged me that if the Court would like to take briefing on any First Amendment legal issues, we are happy to provide it. As you know, our position has been that entertaining the First Amendment privilege assertions at this point is premature because we don't have documents.

THE COURT: So that's easy for -- I could easily order, well, okay, I do nothing on First Amendment. They have to do a privilege log. That's easy, but that doesn't help me about how to handle a deposition. So how are we going to handle the depositions?

MISS PERALES: If Your Honor would like to take briefing from us, we are happy to provide it. Because our position has been that these arguments are premature, we have not provided the Court with fulsome briefing on the topic. But if the Court does want it, we are happy to provide it.

THE COURT: So any of the four of you are welcome to submit briefing on how a deposition should either not go forward, or if it goes forward in part, how should it go forward, because, yeah, the request for production is easy, I just say we'll do a privilege log but that doesn't help us with how to handle a deposition at all.

MISS PERALES: Thank you, Your Honor.

THE COURT: Okay. Thank you all. Let's get that briefing to me in the next five days and then hopefully somewhere right after Thanksgiving I'll produce a ruling on all the remaining issues.

And with that, I've got a criminal case right behind you. I'll be out in a moment.

(Recess)

(Concludes proceedings)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: 11/28/22

/s/ Gigi Simcox
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